

standards work concerning the FBI's "punch list" — precisely because the FBI still has been unable (or unwilling) to describe its proposed capabilities in sufficient detail for industry to begin its work.<sup>82</sup>

The FBI further asserts that referral to TR-45.2 would result in "substantial additional delay," particularly if the FBI must "return to the Commission for further relief" should TR-45.2 not discharge its task properly.<sup>83</sup> There is *no* evidence that TR-45.2 will not implement the Commission's decision fully and *no* evidence to suggest that the FBI would be dissatisfied with any supplemental work by TR-45.2. Indeed, it is noteworthy that, while FBI contends that the current standard is incomplete, it does not contend that TR-45-2 in any respect inadequately addressed the subjects covered by the standard.

Nor is there any reason to believe that referral would result in "substantial additional delay." In the past, industry standards work often has been completed before the Commission completes reconsideration of the matters resulting in the deferral.<sup>84</sup> And in this case, the industry has already commenced discussions of the "punch list" as part of the ongoing Enhanced Surveillance Services ("ESS") effort, which should accelerate TR-45.2's consideration

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<sup>81</sup> (...continued)  
PCIA/USTA Response to Rulemaking Petition at 8 ("[T]he Department's proposed technical requirements have been criticized roundly by industry experts as inefficient, over-engineered and technically inadequate.").

<sup>82</sup> See Letter from Peter Musgrove, Chair, TR-45.2 ESS Ad Hoc Group, to Mike Warren, FBI CALEA Section (May 15, 1998), appended as Exhibit 2 to CTIA's comments.

<sup>83</sup> FBI at 26 ¶ 51. Given the FBI's decision to defer filing its deficiency petition by two years, coupled with its two year delay in publishing law enforcement's capability requirements, one must ask whether the FBI is truly concerned about delay.

<sup>84</sup> See *International Communications Policies Governing Designation of Recognized Private Operating Agencies*, 2 FCC Rcd 7375, 7380 ¶ 34 (1987).

of any additional capabilities. AirTouch submits that the alternate procedure — the Commission adopting detailed rules which the industry does not understand fully or which create incompatibilities — would actually result in more delay overall. Time spent at the outset to develop technical details which manufacturers understand and can use will facilitate their ability to produce CALEA-compliant equipment in a timely fashion.

Moreover, referral to TR-45.2 would also serve the articulated interests of DOJ/FBI. They have stated that the industry “should be required to develop their J-STD-025 solutions in a manner that does not impede, and will indeed facilitate, the future addition of punchlist features.”<sup>85</sup> As a practical matter, this forward-compatible integration will occur only if TR-45.2 has an opportunity to consider any additional requirements that the Commission may impose. DOJ/FBI have also complained about a proliferation of different protocols and the different ways of meeting the assistance capability requirements.<sup>86</sup> Referral to TR-45.2 will enable industry to consider these concerns as additional standards are prepared and will help ensure continued interoperability of equipment produced by different vendors. Finally, DOJ/FBI claim that “duplication of effort and expense is inconsistent with the spirit and purposes of CALEA.”<sup>87</sup> Considerable duplication of effort and expense will be avoided *if* TR-45.2 has the opportunity to standardize any additional capabilities and to incorporate them seamlessly into the current standard. In summary, the case for referral is overwhelming.

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<sup>85</sup> DOJ/FBI Reply Comments at 13 ¶ 20 (May 15, 1998).

<sup>86</sup> *See, e.g.*, DOJ/FBI Joint Petition for Expedited Rulemaking at 57-58 ¶¶ 104-05.

<sup>87</sup> *Id.* at 48 ¶ 84.

#### **IV. The Commission Should Confirm That Any Rules It Adopts Apply to “Covered” Carriers Only**

There is agreement that the industry standard, J-STD-025, applies only to certain telecommunications carriers: landline carriers, cellular carriers, and broadband PCS licensees.<sup>88</sup> Other carriers using different telecommunications technologies, such as paging carriers, raise unique implementation and compliance issues under CALEA.<sup>89</sup> These other technologies were not raised in the petitions subject to the *Public Notice*, and these technologies have not been addressed in the comments submitted in this proceeding. Accordingly, the Commission should confirm that the scope of any new rules or requirements imposed in its order will apply at most only to landline carriers, cellular carriers, and broadband PCS licensees.

#### **V. It Is Premature for the Commission to Invoke Its Section 109(b) Authority**

DOJ/FBI filed their rulemaking petition pursuant to Section 107(b) of CALEA, which expressly authorizes the Commission to determine whether the industry standard is deficient.<sup>90</sup> CDT in its petition, while relying on Section 107(b), has also asked the Commission to invoke its authority under Section 109(b) of CALEA, which authorizes the Commission to determine “whether compliance with the assistance capability requirements of section 103 is reasonably achievable with respect to any equipment, facility, or service installed or deployed

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<sup>88</sup> See, e.g., DOJ/FBI Petition at 4 ¶ 3 (J-STD-025 applies only to “telecommunications carriers providing wireline, cellular, and personal communications services.”); TIA at 15 n.43 (“J-STD-025 only applies to the wireline, cellular and broadband PCS carriers on which the FBI has focused its attention.”).

<sup>89</sup> Indeed, the paging industry recently published its separate, Phase I standard for CALEA compliance. See PCIA Technical Committee, CALEA Subcommittee, *CALEA Suite of Standard for Traditional Paging, Advanced Messaging, and Ancillary Services*, Version 1.0 (May 4, 1998).

<sup>90</sup> See 47 U.S.C. § 1006(b).

after January 1, 1995.”<sup>91</sup> AirTouch submits that it is premature for the Commission to invoke its authority under Section 109(b) of CALEA.

Sections 107(b) and 109(b) are related, but the statutory scheme makes clear that they are designed to address different situations. Section 107(b) is relevant now, where the central issue is which assistance capability requirements CALEA imposes on industry. Section 109(b), in contrast, not only presumes that the requirements of Section 103 are known and settled, but also presumes that manufacturers have made compliant equipment available.<sup>92</sup> This is apparent by the fact that Section 109(b) does not focus on vendors, but rather on the “significant difficulty or expense on the [petitioning] carrier or on the users of the carrier’s systems.”<sup>93</sup> Furthermore, it is apparent that Congress did not intend that the Commission utilize two different legal standards — Sections 107(b) and 109(b) — in reviewing the single question of whether the industry standard meets the statute’s assistance capability requirements.<sup>94</sup>

Moreover, it would be inappropriate for the Commission to invoke Section 109(b) even if this provision were relevant to this proceeding. The Commission is currently examining

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<sup>91</sup> See *id.* at § 1008(b).

<sup>92</sup> See DOJ/FBI Reply Comments at 15 ¶ 27 (Feb. 11, 1998) (“By contrast, determinations of reasonably achievability under section 109 . . . *presuppose[] that technological solutions are available to a carrier.*”)(emphasis in original). AirTouch submits that Nextel has it backwards, in suggesting that the Commission should do a Section 109(b) analysis *before* a Section 107(b) analysis. See Nextel at 5-6.

<sup>93</sup> 47 U.S.C. § 1008(b)(1). That the availability of a CALEA solution is a prerequisite to a Section 109(b) petition is further confirmed by Section 109(b)(2), which effectively requires a carrier to deploy the solution if law enforcement agrees “to pay the telecommunications carrier for the additional reasonable costs of making compliance with such assistance capability requirements reasonably achievable.” 47 U.S.C. § 1008(b)(2)(A).

<sup>94</sup> AirTouch finds noteworthy that CDT’s petition does not address any of the criteria specified in Section 109(b) and that its comments did not mention Section 109(b).

what factors it should consider as part of a “reasonably achievable” Section 109(b) analysis.<sup>95</sup>

Industry obviously cannot address these factors until the Commission determines which ones are relevant. Besides, the Commission did not request comment on Section 109(b) in its *Public Notice*,<sup>96</sup> and, not surprisingly, few commenters even mentioned Section 109(b) in their comments and those that did, did so only in passing.<sup>97</sup>

The Commission has ample authority under Section 107(b) to address the issue now before it: what capabilities does Section 103 require and not require. Once the Commission makes this determination, vendors will have a better idea of what their compliant equipment will cost and carriers, in turn, can decide whether it will be necessary to file a petition pursuant to Section 109(b) of CALEA.

## **Conclusion**

The Supreme Court has held that “we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement.”<sup>98</sup> So, too, the Commission cannot forgive the requirements of CALEA in the name of law enforcement. It bears emphasis that CALEA was compromise legislation. Law enforcement did not get everything it wanted; industry was

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<sup>95</sup> See *Communications Assistance for Law Enforcement*, CC Docket No. 97-213, *Notice of Proposed Rulemaking*, FCC 97-356, at 31-33 ¶¶ 45-48 (Oct. 10, 1997) (“*CALEA NPRM*”).

<sup>96</sup> The Commission specifically request comment on “*whether* the capabilities discussed in the petitions from CDT and from the FBI and DOJ fall within the scope of CALEA.” *Public Notice*, DA 98-762, at 4 (April 20, 1998). This question is relevant to a Section 107(b) analysis; it is not relevant to a Section 109(b) analysis, where the question instead is whether a carrier should be excused from complying with a capability which CALEA requires.

<sup>97</sup> See Nextel at 5-7; PCIA at 5.

<sup>98</sup> *Berger v. New York*, 388 U.S. 41, 62 (1967).

required to provide more than it might have preferred. The FBI Director has testified that CALEA “is not just a compromise but a victory for all of interests involved. The legislation reflects reasonableness in every position.”<sup>99</sup> AirTouch submits that the industry’s implementing standard reflects “reasonableness in every position,” as CALEA mandates.

For the foregoing reasons and those set forth in the comments submitted by industry, AirTouch respectfully requests that the Commission deny the DOJ/FBI and CDT petitions for rulemaking. On the current record, there is no basis for the Commission to commence a notice of proposed rulemaking with regard to either petition.

Finally, the Commission remains obligated to provide “a reasonable time and conditions for compliance with” the industry standard and the Commission’s order.<sup>100</sup> As discussed in its comments, AirTouch recommends that the Commission seek additional public

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<sup>99</sup> Joint Hearings before the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, *Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services*, 103d Cong., 2d Sess., at 112 (1994)(Testimony of FBI Director Freeh).

<sup>100</sup> 47 U.S.C. § 1006(b)(5).

comment regarding the new compliance date so industry can present realistic proposals based on the Commission's order.<sup>101</sup>

Respectfully submitted,

**AIRTOUCH COMMUNICATIONS, INC.**

A handwritten signature in black ink, appearing to read "Michael D. W. Mowery". The signature is fluid and cursive, with a long horizontal stroke at the end.

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June 12, 1998

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<sup>101</sup> See AirTouch at 28-29. This recommendation presupposes Commission grant of a Section 107 CALEA compliance extension for all affected carriers. See *id.*

## **CERTIFICATE OF SERVICE**

I, Jo-Ann G. Monroe, hereby certify that I have on this 12th day of June, 1998 caused a copy of the foregoing Reply Comments to be served by first class U.S. mail, postage prepaid, to the following:

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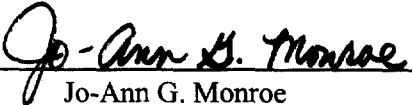
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